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Judgment: 8.3.90

HOUSE OF LORDS

IN RE McK (NORTHERN IRELAND)

LORD KEITH OF KINKEL

My Lords,

Lord Keith of Kinkel
Lord Templeman
Lord Ackner
Lord Goff of Chieveley
Lord Jauncey of Tullichettle

I have had the opportunity of considering in draft the speech to be delivered by my noble and learned friend Lord Goff of Chieveley. I agree with it, and for the reasons he gives would allow this appeal.

LORD TEMPLEMAN

My Lords,

For the reasons to be given by my noble and learned friend, Lord Goff of Chieveley, I would allow this appeal.

LORD ACKNER

My Lords,

I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Goff of Chieveley, I agree with it and for the reasons which he gives, I too would allow this appeal.

LORD GOFF OF CHIEVELEY

My Lords,

The question which arises for decision on this appeal is whether paragraphs (2) and (3) of rule 9 of the Coroners (Practice and Procedure) Rules (Northern Ireland) 1963 (S.R. & O. (N.I.) 1963 No. 199) made by the Ministry of Home Affairs, after consultation with the Lord Chief Justice, in purported exercise of powers conferred upon the Ministry by section 36(1)(b) of the Coroners Act (Northern Ireland) 1959, were ultra vires the Ministry, on the ground that paragraphs (2) and (3) did not regulate "practice and procedure" at or in connection with inquests and post-mortem examinations as required by section 36(1) (b). Rule 9 provides:

HOUSE OF LORDS

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CORRIGENDA

Page 3, line 21 from the bottom of the page: Delete the rest of the sentence after Accordingly, and insert "he declined to set aside the coroner's decision to admit in evidence the written statements of A, B and C."

"(1) No witness at an inquest shall be obliged to answer any question tending to incriminate himself, and, where it appears to the coroner that a witness has been asked such a question, the coroner shall inform the witness that he may refuse to answer. (2) Where a person is suspected of causing the death, or has been charged or is likely to be charged with an offence relating to the death, he shall not be compelled to give evidence at the inquest. (3) Where a person mentioned in paragraph (2) offers to give evidence the coroner shall inform him that he is not obliged to do so, and that such evidence may be subject to cross-examination."

The conclusion of the Court of Appeal, was that, whereas paragraph (1) of rule 9 merely restates a rule of substantive law relating to the privilege of a witness against self-incrimination, paragraphs (2) and (3) purport to modify the substantive law relating to the compellability of witnesses and as such go beyond matters of practice or procedure. Such modification could only, the respondent contends, have been made by statute, not under a rule-making power limited to regulating practice and procedure.

The matter has arisen in the following way. An inquest was opened on 14 November 1988 at Craigavon Courthouse before Her Majesty's Coroner for Armagh, Mr. J. H. S. Elliott, and a jury. The inquest was into the deaths of three men - Eugene Toman, John Frederick Burns and James Gervaise McKerr - the undisputed cause of whose deaths was that they were killed by shots fired by members of the Royal Ulster Constabulary in County Armagh on 11 November 1982. The respondent, Eleanor McKerr, is the widow of James Gervaise McKerr. In the course of the shooting which caused the deaths, shots were fired by three members of the Royal Ulster Constabulary, who have been referred to as A, B and C. A, B and C had been charged with, tried for and acquitted of the murder of Eugene Toman before the opening of the inquest on 14 November 1988.

The coroner held a preliminary meeting on 27 October 1988. That meeting was attended by legal representatives of the interested parties, including Mr. Finucane, a solicitor acting for the respondent. At the meeting, the coroner told those present that he had been informed that A, B and C (who had been notified of the inquest) did not, as persons suspected of causing the deaths of the deceased and having been charged with an offence relating to one of those deaths, wish to give evidence at the inquest. At the opening of the inquest itself, the coroner, in the course of his opening address, informed the jury (as he had previously informed the legal representatives of interested parties) that he proposed to admit in evidence and put before them written statements which had been made by A, B and C relating to the circumstances in which the deceased were shot, although he told them that the weight of such statements might not be as great as that of sworn evidence given by A, B and C in person at the inquest. Objection was made on behalf of the respondent to the admission by the coroner of the written statements of A, B and C in evidence. She then sought to challenge the coroner's decision on this point by way of judicial review in the High Court, her principal argument being that paragraphs (2) and (3) of rule 9 were ultra vires, and

(1) No witness at an inquest ... and where it

that accordingly A, B and C were witnesses who could and should be compelled to attend the Inquest and to give evidence.

This submission was rejected by Carswell J. He said:

> "In my opinion one has to look at the phrase 'practice and procedure' in the context in which it is found. Section 36 of the Act of 1959 was enacted to enable the rule-making body to frame rules which would govern the whole of the conduct of coroners' proceedings, in connection with inquests, post-mortem examinations, exhumations and burials. It was in my view designed to cover and capable of covering all procedural matters which might arise in the course of an inquest. The conferment of immunity from having to give evidence at all can properly be regarded as a matter coming within the practice or procedure of the coroner's court, being one which is part of the proceedings of the cause within the court and arising in the course of the hearing. It therefore may be distinguished from a rule which purports to grant an elevated status of evidential privilege or immunity to certain documents. It seems to me that it is part of the procedure in the coroner's court, notwithstanding the fact that it may not apply in any other court. It does not enlarge the ambit of privilege against self-incrimination, which is dealt with by rule 9(1). It was argued that the effect of paragraph (2) was to enlarge that privilege for the persons coming within the paragraph, for if it is valid they do not have to give evidence at all, and so they are given a privilege against answering any questions at all. If this be so, it is nevertheless something which only occurs within the proceedings held in a coroner's court, and I consider that rule 9(2) and (3) are within the powers conferred by section 36 of the Act of 1959"

Accordingly, he dismissed the respondent's application for judicial review. His decision was, however, reversed by the Court of Appeal. In a unanimous judgment delivered by Sir Brian Hutton L.C.J., the court referred to the

> "clear and well established principle of law that, with a few specific and limited exceptions, every person is a competent witness and that, again with a few specific and limited exceptions, every competent witness is a compellable witness."

In their opinion, paragraphs (2) and (3) of rule 9 constituted a major departure from the general law relating to the compellability of witnesses, which applied to coroners' courts as to other courts. In so doing, the two paragraphs purported to change substantive law, and did not merely regulate practice or procedure. Accordingly, the two paragraphs were ultra vires the rule-making authority. The court further held that the two paragraphs were ultra vires as being inconsistent with section 17(1) of the Act of 1959. (I shall refer in due course to the terms of that subsection.) Against that decision the appellant now appeals to your Lordships' House, by leave of this House.

In Northern Ireland, the law relating to coroners is the subject of the Act of 1959, which is expressed to be an Act to

amend and consolidate the law relating to coroners. The coroner's inquest into death provides, inevitably, the principal subject matter of the Act, which also deals briefly with the coroner's inquest on treasure trove. Section 11(1) provides that a coroner who is informed that there is within his district the body of a deceased person, and that there is reason to believe that he has died in certain specific circumstances, shall make such investigation as may be required to enable him to determine whether or not an inquest is necessary. Section 13 provides that a coroner within whose district (a) a dead body is found or (b) an unexpected or unexplained death, or a death in suspicious circumstances or in certain other specified circumstances, occurs may hold an inquest either with a jury, or (except in certain specified circumstances where a jury is required) without a jury. Section 14 provides that, in certain circumstances, the Attorney-General may direct a coroner to conduct an inquest.

A coroner's inquest provides an example of inquisitorial procedure. In Reg. v. South London Coroner; Ex parte Thompson, (unreported), 8 July 1982, Lord Lane C.J. stressed this fact in the following passage:

> "Once again it should not be forgotten that an inquest is a fact finding exercise and not a method of apportioning guilt. The procedure and rules of evidence which are suitable for one are unsuitable for the other. In an inquest it should never be forgotten that there are no parties, there is no indictment, there is no prosecution, there is no defence, there is no trial, simply an attempt to establish the facts. It is an inquisitorial process, a process of investigation quite unlike a trial where the prosecutor accuses and the accused defends, the judge holding the balance or the ring, whichever metaphor one chooses to use."

It follows that witnesses at an inquest are not called by interested parties. It is for the coroner to decide which witnesses are to be summoned to give evidence. Section 17 of the Act of 1959 provides:

> "(1) Where a coroner proceeds to hold an inquest, whether with or without a jury, he may issue a summons for any witness whom he thinks necessary to attend such inquest at the time and place specified in the summons, for the purpose of giving evidence relative to such dead body and shall deliver or cause to be delivered all such summonses to a constable who shall forthwith proceed to serve the same. (2) Nothing in this section shall prevent a person who has not been summoned from giving evidence at an inquest."

Section 20 provides, in subsection (1), that a witness duly summoned who fails to appear in answer to the summons may, in the absence of any reasonable excuse, be fined by the coroner, and, in subsection (2), that a witness who appears but refuses without reasonable excuse to testify may likewise be fined by him. Section 31(1) indicates the purpose of a coroner's inquest upon a death by providing that a coroner's jury's verdict shall set forth who the deceased person was, and how, when and where he came to his death. Section 36(1)(b) contains the relevant rule-making power, providing that the Ministry of Home Affairs may by rules

made after consultation with the Lord Chief Justice "regulate the practice and procedure at or in connection with inquests and post-mortem examinations," and that in particular such rules may contain provisions as to the procedure at inquests heard with a jury or without a jury.

In purported exercise of that power, the Ministry made the Rules of 1963. The rules are 42 in number, covering numerous topics. Rule 7 provides that properly interested persons shall be entitled to examine any witness at an inquest. I have already quoted rule 9. Rules 8 and 10 provide:

> "8(1) The coroner shall examine on oath, touching the death of a person on whom an inquest is held, all persons who tender their evidence respecting the facts and all persons whom he thinks it expedient to examine as being likely to have knowledge of the relevant facts. (2) Unless the coroner otherwise determines, a witness at an inquest shall be examined first by the coroner and, if the witness is represented at the inquest, lastly by his representative."

> "10. Any person whose conduct is likely in the opinion of the coroner to be called in question at an inquest, shall, if not duly summoned to give evidence at the inquest, be given reasonable notice of the date, hour and place at which the inquest will be held."

Rule 13(1) (as amended by the Coroners (Practice and Procedure) (Amendment) Rules (Northern Ireland) 1980 (S.I.(N.I.) 1980 No. 444), rule 2 and Schedule) provides as follows:

> "If on an inquest touching a death the coroner is informed that some person has been charged before a justice of the peace with the murder, manslaughter, child destruction or infanticide of the deceased, or under section 118(1) of the Road Traffic Act (Northern Ireland) 1970 with the offence of having caused the death of the deceased by driving recklessly or under section 13(1) of the Criminal Justice Act (Northern Ireland) 1966 with the offence of aiding, abetting, counselling or procuring the suicide of the deceased, he shall, in the absence of reason to the contrary, adjourn the inquest until after the conclusion of the criminal proceedings."

Rules 15 and 16 specify the matters to which an inquest shall be directed. They provide (as amended):

> "15. The proceedings and evidence at an inquest shall be directed solely to ascertaining the following matters, namely: (a) who the deceased was; (b) how, when and where the deceased came by his death; (c) the particulars for the time being required by the Births and Deaths Registration (Northern Ireland) Order 1976 (S.I. 1976/1041 (N.I. 14)."

> "16. Neither the coroner nor the jury shall express any opinion on questions of criminal or civil liability or on any matters other than those referred to in the last foregoing rule."

Rule 17, which is concerned with documentary evidence, provides (as substituted):

> "(1) A document may be admitted in evidence at an inquest if the coroner considers that the attendance as a witness by the maker of the document is unnecessary and the document is produced from a source considered reliable by the coroner. (2) If such a document is admitted in evidence at an inquest the inquest may, at the discretion of the coroner, be adjourned to enable the maker of the document to give oral evidence if the coroner or any properly interested person reasonably so desires. (3) Such a document shall be marked by the coroner in accordance with these rules with the additional words 'received pursuant to rule 17.'"

Rule 20 provides that no person shall be allowed to address the coroner or the jury as to the facts unless the coroner shall so permit. Rules 21, 22 and 23 make provision for the jury's verdict. It is not necessary for me to refer to the remainder of the rules.

In considering the question which arises in this appeal it is, I think, important to bear in mind that a coroner's inquest is an inquisitorial process. The coroner has the conduct of the proceedings at an inquest. In particular, it is for the coroner to decide whether a witness shall be summoned to attend an inquest for the purpose of giving evidence; indeed, under section 17 of the Act of 1959, he can issue a summons for any witness whom he thinks necessary to attend the inquest for the purpose of giving evidence. The breadth of this power is reflected in rule 8(1) of the rules. But it is, with all respect to the Court of Appeal, misleading, in the context of a coroner's inquest, to describe the compellability of a witness as an "important common law right." Such language is reminiscent of civil proceedings, and of the right of a party to such proceedings to cause a subpoena to be issued to compel the attendance of a witness. At a coroner's inquest, however, there are no parties. There is simply an inquisition by the coroner; and it is for him to decide whether any particular witness shall be summoned to give evidence. In this context, the compellability of a witness is essentially a power which rests in the coroner himself, a power which is now statutory having regard to the provisions of sections 17 and 20 of the Act of 1959. It is difficult to think of any witnesses who would not be so compellable, apart from those who enjoy an immunity from compellability by statute (such as diplomatic or consular officials, and others in like position). It must also be very rare, at an inquest, for questions of competence to arise, given that at an inquest there is no accused person, the inquest being directed solely towards the ascertaining of certain facts. In practical terms, the coroner's power of compulsion extends, as section 17 provides, to any witness whom he thinks necessary to attend at the inquest for the purpose of giving evidence relative to the dead body.

It follows, therefore, that what rule 9(2) does is not to interfere with a substantive right; it rather restricts, in certain specified circumstances, the exercise of a power vested in coroners to compel witnesses to give evidence at an inquest. The question for decision is whether rule 9(2), in imposing that restriction, can properly be described as a rule which "regulate[s] the practice and procedure at or in connection with inquests. . . ."

What is meant by "practice and procedure"? The answer to this question must, to some extent, depend upon the context in which the expression is used. In the context of civil proceedings, a distinction has been drawn between "the mode of proceeding by which a legal right is enforced," and "the law which gives or defines the right" (see Poyser v. Minors (1881) 7 Q.B.D. 329, at p. 333, per Lush L.J.). Such a distinction is scarcely apt in relation to a coroner's inquisition, which is not concerned with the enforcement of legal rights. Even so, it is sensible to refer to the mode of proceeding by which the coroner exercises his jurisdiction to conduct an inquest, and it is appropriate to refer to rules which regulate that mode of proceeding as being rules which regulate the practice and procedure at an inquest; though, like Lush L.J. in Poyser v. Minors, I doubt whether, in coroners' inquests as in civil proceedings, any material distinction can be drawn between "practice" and "procedure."

Of course, a distinction has to be drawn between the coroner's jurisdiction itself, which must be a matter of substantive law, and rules which regulate the manner in which he is to exercise that jurisdiction. But even so, there is a difficulty. For many rules of procedure do inhibit, in one way or another, the power of a tribunal to conduct its own proceedings. The whole function of rules of procedure is to create a system of rules which provide a framework within which the relevant process shall be conducted, thereby regulating the manner in which the tribunal conducts that process. Moreover, in the present context, examples of the inhibiting effect of rules of procedure can be found in other provisions of the rules, such as rule 4 (formalities at inquests); rule 5 (holding inquests in public); rule 6 (days on which inquests shall not be held); rule 7 (properly interested persons to be entitled to examine witnesses); rule 8(1) (examination of witnesses on oath); rule 13(1) (adjournment of inquest until after the conclusion of certain criminal proceedings); rules 15 and 16 (matters to which inquests shall be directed); rule 17 (documentary evidence); rules 18 and 19 (exhibits); and rules 21, 22 and 23 (the jury's verdict). All of these rules restrict, in various ways, to a greater or lesser extent, what would otherwise be the unfettered power of a coroner to conduct an inquest. The mere fact that they so restrict his power does not, in my opinion, prevent the rules from being rules which regulate practice and procedure.

Nor, in my opinion, does the mere fact that a rule restricts the power of a coroner as to the evidence which he may call prevent the rule in question from being one which regulates practice or procedure. In this connection, rule 17, concerned with documentary evidence at inquests, provides an apt illustration. I have already set out the text of that rule (as amended). A similar, though not identical, rule applies in relation to documentary evidence at coroners' inquests in England and Wales: see rule 37 of the Coroners Rules 1984 (S.I. 1984 No. 552). The general rule is that a coroner, who is conducting an inquisitorial process concerned to elicit certain facts, is not bound by the strict rules of evidence. Yet here, in rule 17, we find a rule which defines the power of a coroner to admit documentary evidence. I cannot, for my part, see why that fact should prevent the rule from being described as a rule which regulates practice or procedure at a coroner's inquest. It plainly does, in that it

regulates the manner in which the coroner shall, at an inquest, set about his task of eliciting the relevant facts.

Turning to rule 9(2) itself, the text of that rule has, in my opinion, to be considered with reference to its subject matter. The rule is concerned with the evidence of a person suspected of having caused the death, or having been charged or being likely to be charged with an offence relating to the death. In this connection, regard should also be had to rule 13(1) which provides that where a coroner is informed that a person has been charged with murder or manslaughter or one of certain other criminal offences concerned with wrongfully causing or being concerned with the death of the deceased, he shall, in the absence of reason to the contrary, adjourn the inquest until after the conclusion of the criminal proceedings. This has the effect that a coroner's inquest defers to such criminal proceedings.

Whether there was at any time a practice in coroners' inquests in Ireland not to compel persons to give evidence who now fall within the category specified in rule 9(2) is not clear. In this connection Mr. Kerr Q.C., for the appellant, who urged that there was some such practice, relied in particular on two 19th century cases, In re Rearden (1873) 7 Ir.L.T. 193, and In re Marshall (1874) 8 Ir.L.T. 1, both decisions of Fitzgerald J. (later Lord Fitzgerald, the first Irish Lord of Appeal). In the first of these cases Fitzgerald J. decided that the court would, in the exercise of its discretion, grant a writ of habeas corpus to have a prisoner in attendance at a coroner's inquest, so that he might be examined as a witness. The motion was on behalf of the prisoner himself, who had been charged with having caused the death of a woman into whose death the coroner was about to hold an inquest, and who wished to have the opportunity of giving evidence at the inquest. His application was opposed by the Crown, the law officers having advised that the practice of transmitting prisoners to coroners' courts was unwarranted in law. Fitzgerald J., being satisfied that the prisoner desired to be present at the inquest, that the coroner did not object to his presence, and that his presence would not frustrate the ends of justice, ordered that a writ of habeas corpus ad testificandum be issued, directed to the governor of the prison where the applicant was held. That decision was challenged three months later in In re Marshall, when the Solicitor-General appeared for the Crown; but Fitzgerald J. adhered to his previous decision, and made the same order again in similar circumstances. In the course of his judgment, he had this to say, at p. 5:

> "It is not for me to say, should the prisoner be tendered as a witness before the coroner, whether he should or should not refuse to receive her evidence, nor is it for me to inquire with what object she might be tendered as a witness before the coroner. It is open to her advisers, should they think fit, to tender her before the coroner as a witness, and I cannot say, if her evidence is offered, that it will not be material. I, for one, have long entertained the opinion, and have repeatedly expressed it from the Bench, that, at the final trial before the judge and petty jury, prisoners should be allowed to tender themselves and be received as witnesses, if they so desired it; I believe that there is a great defect in the law as it stands at present, and I think

that an alteration in the law to that effect should be made, as it would be most conducive to the due administration of criminal justice. The adviser of the prisoner has sworn that it would be necessary for the prisoner to be present at the inquest before the coroner, in order that she might be tendered as a witness; and I must treat the application, with that view, as bona fide. That course, if adopted, will be taken at the peril of the party; and if I were sitting as a coroner, although I would not call upon her to be examined, I should be very slow to refuse to receive her evidence if it were offered."

How far the opinion of Fitzgerald J. that he would not call upon such a witness to be examined represented a practice at coroners' inquests in Ireland, I am unable to say. It is, however, right to observe that, having been taken by counsel through the earlier authorities, no authority has come to light in which it was held that any such witness should be compelled to give evidence at a coroner's inquest. In particular Wakley v. Cooke (1849) 4 Ex. 511 decides no more than that a coroner should not exclude the evidence of a person who desires to give evidence at the inquest, on the ground that his conduct might afterwards become the subject of a criminal inquiry, because "the refusal to accept a person's testimony casts a gross imputation upon him" (per Alderson B., at p. 518). Nor am I able to say how far Fitzgerald J.'s view was affected by the then rule (soon to be abolished in England, though not until 1923 in Northern Ireland) that a prisoner was not competent to give evidence at his own trial. If however any such practice existed (founded perhaps upon the proposition that an accused person is not bound to give evidence at his trial, and therefore that it would be oppressive to place a person who was suspected of causing a person's death, even more one who was likely to be charged with his death, in the position where he had to have resort to the privilege against self-incrimination at a coroner's inquest, or alternatively upon the proposition that the witness's evidence is a matter for consideration by the criminal courts, to which the coroner's inquest must defer), I myself would not have hesitated to describe it as a rule of practice or procedure as opposed to a rule of substantive law. It is true that the effect of such a practice would be that the coroner's power to compel a witness to give evidence at an inquest would to that extent be inhibited. But here there would be no question of depriving a party to civil litigation of a substantive right; nor would there be any question of creating a new category of privilege, or of expanding an existing privilege, as a matter of general law. There would simply be a rule of practice or procedure in coroners' inquests which had the effect that at such inquests certain persons were not to be put in a position where they were compelled to have resort to the privilege against self-incrimination.

For the like reasons rule 9(2), and the accompanying rule 9(3), are, in my opinion, no more than rules of practice or procedure, applicable in coroners' inquests in Northern Ireland. True it is that, under rule 7(1), any properly interested person is entitled to examine any witness at an inquest; but not only does that rule presuppose that the witness in question is a witness at the inquest, but it must be read subject to rule 9, which forms part of the same body of rules.

In the judgment of the Court of Appeal, reliance was placed upon In re Grosvenor Hotel, London (No. 2) [1965] Ch. 1210, in which the Court of Appeal in England held that a rule of the Supreme Court which purported to give effect to the principle of Crown privilege but did so in terms too favourable to the Crown was ultra vires as being outside the powers of the Supreme Court Rule Committee, whose powers are limited to making rules for regulating and prescribing the procedure and practice of the Supreme Court. But, as Lord Denning M.R. pointed out in his judgment, at p. 1243, that case was concerned with a principle of constitutional law, which is not a matter of procedure or practice; and it was plainly beyond the power of the Rule Committee to expand that principle to the detriment of ordinary litigants in civil proceedings. Such a case is very different from the present, where the rule in question does no more than require Northern Ireland coroners to exercise their powers of inquisition in such a manner as will give protection to citizens falling within certain specified categories, who might otherwise be compelled to give evidence and so be exposed to the embarrassment, in circumstances where they may be the subject of criminal proceedings, of invoking the privilege against self-incrimination.

The Court of Appeal further held that paragraphs (2) and (3) of Rule 9 were ultra vires as purporting to override section 17(1) of the Act of 1959. However, all that section 17(1) does is to confer on the coroner power to issue summonses for witnesses whom he thinks necessary to attend the inquest. For the reasons I have already given, I cannot see that the mere fact that paragraphs (2) and (3) of rule 9 impose a restriction on that power with regard to certain categories of persons prevents those paragraphs from regulating practice or procedure.

For these reasons, which are substantially the same as those of Carswell J., I would allow the appeal.

LORD JAUNCEY OF TULLICHETTLE

My Lords,

For the reasons to be given by my noble and learned friend, Lord Goff of Chieveley, I would allow this appeal.